Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JOHN MANSOUR

Petitioner,

vs.

RONALD GOLDSTOCK and MARTIN MARCUS,

Respondents.

Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN MANSOUR, ESQ.
Pro se
489 Harrogate Drive
Rochester, New York 14625
Telephone: (716) 381-7749

Daily Record Corporation (716) 232-6920
P.O. Box 6
Rochester, New York 14601

(20973)

85 pp

QUESTION PRESENTED

A staff investigator proposed that petitioner, a prosecutor, cancel an arraignment to facilitate the abusive use of an arrest warrant. Petitioner rejected the proposal and told the investigator and his own supervisor that the proposal was for an abusive use of the warrant. The proposal was not implemented.

Question: Was petitioner's disapproval of the proposal for abuse of the warrant constitutionally protected speech?

A. Is a co-worker's proposal for wrongdoing a "potential wrongdoing" within this Court's application of a "matter of public concern" under the First Amendment?

PARTIES

The parties to this action are now:

Petitioner: JOHN MANSOUR

Respondents: RONALD GOLDSTOCK AND MARTIN MARCUS

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I: Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14, Section 1: Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, §1983: Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this sec-

tion, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OPINION BELOW

The single opinion pertinent to this petition is that of the state court upon its dismissal of the action by summary judgment

This opinion was reported in part at ***Mansour v. Abrams*, 151 Misc. 2d 121, 573 NYS 2d 364**.

The complete opinion is at Appendix B.

STATEMENT OF JURISDICTION

The final order which denied petitioner's motion for leave to appeal to the New York State Court of Appeals was entered in that Court on June 13, 1995. It is Appendix A. That order exhausted petitioner's remedies in the state courts.

The jurisdiction of this Court is invoked under 28 USCS §1257 and Rule 10(.1)(c) of the Rules of the Supreme Court, as pertain to when a state court decides a federal question in a way that conflicts with the applicable decisions of this Court.

STATEMENT OF THE CASE

FACTS

Petitioner was a prosecutor. He had scheduled an arraignment by surrender of the accused in Court with his lawyer for the next day. A staff investigator proposed to petitioner that he cancel the arraignment so that instead the accused could be ar-

rested by execution of the indictment warrant several days later, on a Friday night, so as to jail the accused over a weekend. His only reason was that the weekend jailing's "shock value" might serve to coerce the accused into helping the investigator in his work.

Petitioner answered to the investigator that to cancel the arraignment to facilitate a later arrest and weekend jailing as a pressure tactic, was an improper use of an arrest warrant. The investigator complained to headquarters. Petitioner's supervisor called, and petitioner repeated his disapproval of the proposal and his reason for it to his supervisor. His supervisor was angry at petitioner's disapproval but relented to petitioner's view. The investigator's proposal was not implemented. A few months later petitioner was fired.

Petitioner reasonably considered this proposed use of the arrest warrant as abusively ulterior to its legitimate function. The same kind of tactic for gratuitous jailing had been condemned long before in New York as an abuse of the warrant process. ***Rothbard v. Ringler*, [N.Y. Sup. Ct. 1947], 77 NYS 2d 351.**

[Record reference is R 2531-2533 (¶12, Mansour affidavit), R 558-559, 2245-2252]

History of the Federal Question

Petitioner sued in state court under 28 USC §1983 for discharge from employment in violation of his free speech rights under the First Amendment of the United States Constitution.

The trial court dismissed this claim on a motion for summary judgment. The part of its opinion relevant to this appli-

cation was reported at 151 Misc. 2d 121, 573 NYS 2d 364. The full opinion is at Appendix B. Its order of dismissal is at Appendix C.

The Appellate Division, Fourth Department, affirmed the dismissal on the opinion of the trial court by order of July 14, 1992 (case #79 at 185 AD2d 671, 587 NYS 2d 880). Appendix D.

The Court of Appeals, by order entered October 27, 1992, dismissed appeal from the order of affirmance on the ground that the appeal was from a non-final order. (80 NY 2d 972). Appendix E.

Petitioner went to trial on other claims in the complaint. Final judgment against petitioner on those claims was entered November 28, 1994. Appendix F.

By order entered February 21, 1995 the Court of Appeals dismissed petitioner's appeal as of right from the prior non-final order of the Appellate Division of July 14, 1992, on the ground the appeal did not raise a substantial constitutional question. Appendix G.

By order filed June 13, 1995, the New York State Court of Appeals denied petitioner's motion for leave to appeal to the Court of Appeals from the prior non-final order of the Appellate Division of July 14, 1992. Appendix A.

This exhausted petitioner's remedies for review in the state courts.

REASONS TO GRANT THE WRIT

This case involves the First Amendment right of a staff prosecutor to disagree within the office with a co-worker's proposal which, if implemented, would improperly prejudice a fundamental right of an accused.

Here, petitioner voiced disapproval to a co-worker and his own supervisor about a proposal for action by the office which petitioner saw as abusively improper. His supervisor was displeased with petitioner's disapproval but acceded to it. The proposed abuse did not happen. Petitioner was later fired.

The state court concluded that because the proposed abuse did not come to fruition, i.e., that no "illegal or unethical conduct" resulted from it, petitioner's disagreement with it was speech about an "internal office affair" and thus not protected by the First Amendment.

> "Most of (the matters) appear to involve disagreements over the internal affairs of the Task Force. *Disagreement(s) over ... whether the Task Force should have arrested an individual or allowed him to surrender .... do(es) not evidence any illegal or unethical conduct by the Task Force,* nor does Plaintiff allege that they do. *Clearly, therefore, they are not matters of public concern.* Every criticism by a public employee directed at his superiors does not 'plant the seed of a constitutional case .... [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal affairs' (Connick v. Myers, 461 U.S. 138, 149, *supra*)." (emphasis supplied) *Appendix B, pp. 7-8 [R-35-36].*

This Court has noted that "matter of public concern" extends to speech about *potential* wrongdoing in the course of the employer's operations. ***Connick v. Myers,* 461 U.S. 138, 148, 103 S. Ct. 1684, 1691, 75 L. Ed. 2d 708, 721 (1983).**

Petitioner contends the state court misapplied this Court's "internal office affairs" exception to constitutional protection, to petitioner's speech about "potential wrongdoing" which deserves constitutional protection. ***Connick v. Myers, supra,* 461 U.S. at p. 149, 103 S. Ct. at p. 1684, 75 L. Ed. 2d at p. 721.**

The correct application of "potential wrongdoing" under the First Amendment should include a co-worker's proposal which, if implemented, would wrongly affect a substantial right of an accused. The abusive proposal *itself* creates sufficient "potential for wrongdoing" that disagreement with it deserves constitutional protection. Applied here, the proposal to cancel the arraignment to facilitate a later arrest and jailing, *per se* raised a concern about the accused's Fourth Amendment privilege from unreasonable government interference with his personal liberty by misuse of a warrant.

Constitutional protection should depend upon the content of the proposal and the response to it. It should not depend on a future event unpredictable at the time one speaks. Whether the proposal ever comes to fruition should be constitutionally irrelevant.

The effect of the state court decision to the contrary will be to inhibit the spontaneous discourse among staff needed for the sorting out of ethical issues — and effective self-regulation — within the secretive prosecutors' offices.

It presents First Amendment dilemmas. Each staff prosecutor is personally accountable as an officer of the court for the ethic of his own conduct. Each has an official duty to the public, by oath of office, to avoid impairment of the administration of justice by prejudice to an important right of the accused. Yet, the state court's decision will predictably give pause to many otherwise inclined to speak about ethically questionable aspects of a pragmatically attractive proposal:

> (1) One who discovers an impropriety in a proposal, and succeeds in its prevention, is subject to discharge — but one who silently acquiesces in the improper proposal and speaks out only after the misdeed is done, is rewarded with constitutional protection.
>
> (2) One who disagrees *too persuasively* with a proposal for misconduct, risks retaliation — but one who tenders but unpersuasive lip service to the duty to disagree minimizes the risk of being fired.

The state court decision equates "conscientiousness to duty" to "troublemaker" when someone discovers and airs an ethical taint to an ambitious proposal. It unsettles the law about the "basic, unquestioned constitutional rights" of prosecutors who voice disagreement with internally aired proposals for misconduct. It is a dubious expansion of the qualified immunity defense to the employer. ***Harlow v. Fitzgerald*, 457 U.S. 800, 818-819, 102 S.Ct. 2727, 2738, 73 L. Ed. 2d 396, 410-411 (1982).**

We urge the Court to take this opportunity to clarify that the "basic unquestioned constitutional right" of a government employee to disagree with a co-worker's proposal for wrongdoing does not depend upon whether wrongful conduct later occurs.

THE QUESTION PRESENTED AFFECTS THE SUBSTANTIAL RIGHTS OF THE PETITIONER

The state court dismissal of this claim forced petitioner to go to trial with but part of his case. The jury could not consider whether the dismissed claim either by itself, or along with the First Amendment violations it did find — overcame the respondent's affirmative defense of justification (acceptance of which was the basis of its verdict) and warranted a verdict for petitioner. The prejudice to petitioner is highlighted by the fact that at trial respondents evidenced petitioner's disagreement with the investigator's proposal as justification for their decision to fire him.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

John Mansour, Esq., *pro se*
489 Harrogate Drive
Rochester, New York 14625
(716) 381-7749

Dated: August 21, 1995

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of June 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

4-10 Mo. No. 443
John Mansour et al.,

Appellants,

v.

Robert Abrams, et al.,

Respondents.

A Motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

State of New York
Court of Appeals

Donald M. Sheraw — *Clerk's Office*
Clerk of the Court — *Albany, New York 12207*

DECISION June 13, 1995

4-10 Mo. No. 443 Motion for leave to appeal denied.
John Mansour et al.,
Appellants,
v.
Robert Abrams, et al.,
Respondents.

DECISION

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

JOHN MANSOUR and HELGA-ROSWITHA MANSOUR

Plaintiffs, INDEX NO. 13559/87

vs.

ROBERT ABRAMS, RONALD GOLDSTOCK and MARTIN MARCUS,

Defendants.

APPEARANCES

John Mansour, Esq.
489 Harrogate Drive
Rochester, New York 14625
Pro se, and as attorney
for Helga-Roswitha Mansour

Robert Abrams, Attorney General for the
State of New York
Diane M. Cecero, Esq. and Eugene Welch, Esq.
Assistant Attorneys General, of Counsel
144 Exchange Street
Rochester, New York 14614
Attorneys for Defendants

DECISION

David O. Boehm, J.

The plaintiff, John Mansour, joined the New York State Organized Crime Task Force (Task Force) as an Assistant Attorney General in 1970, serving at the pleasure of the Attorney General. On June 30, 1981, defendant, Ronald Goldstock, was appointed by the Governor and the Attorney General, defendant Robert Abrams, to head the Task Force. A year later, on July 1, 1982, defendant, Martin Marcus, was hired as First Assistant in charge of Field Operations.

The Task Force had been without a permanent director for eight years before Goldstock was appointed, and was described in a study by the Battelle Memorial Institute as "moribund" for much of its existence (Defendants' Exh. T., p 36). After his appointment, Goldstock obtained a larger budget, hired additional staff and implemented a major reorganization involving the formation of investigative teams comprised of investigators, accountants, analysts and lawyers. Under the team structure, decisions involving investigations and prosecutions were be made by consensus. Although deferred to on legal matters, the attorney team member no longer had line authority over non-legal professional staff. Disputes among team members were resolved by Marcus and Chief Investigator, Fred Rayano, and, if necessary, by Goldstock. Goldstock and Marcus were involved with the details of all investigations, and they, together with Rayano, regularly visited the regional offices.

Prior to Goldstock's appointment, the plaintiff had been the de facto supervisor of the staff at the Rochester regional office. However, after the reorganization, he was assigned as team attorney with the Financial Crimes Team for the Task Force's western region, headquartered in Buffalo.

Performance evaluations prepared by Marcus indicate that the plaintiff did not perform well within the team structure. The evaluations noted that plaintiff's morale was low, that he failed to

provide adequate legal support for his team, did not take an active role in his team's investigations and that, as a result, friction developed between him and the other members of the team.

Due to plaintiff's evaluated performance, it was decided to terminate his employment. On October 26, 1983, during a performance evaluation meeting with plaintiff, Marcus told him to find a new job and that he had until February 1, 1984 to do so. The deadline passed without plaintiff obtaining new employment and was extended to March 7, 1984.

Following his termination, plaintiff commenced this action seeking damages for defamation, interference with contractual rights and, under Section 1983, for violation of his civil rights. Defendants have moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment and for leave to amend his complaint.

At oral argument, defendants were granted summary judgment dismissing plaintiff's defamation and interference with contractual rights causes of action and the civil rights claim against Abrams. Decision was reserved on the other portions of their motions.

The amended complaint and plaintiff's affidavit submitted on this motion set forth that on a number of occasions plaintiff expressed himself on matters of public concern, and that such expressions were a substantial factor in defendants' decision to discharge him. Specifically plaintiff alleges that he refused instructions from Marcus and Goldstock to present a matter to a Grand Jury because the Grand Jury had no power to consider the matter; that he disagreed with Marcus whether there was sufficient evidence to obtain an indictment in Monroe County for criminal possession of stolen property against a suspect because there was no proof of possession in Monroe County; that he accepted an attorney's offer to surrender his client for arraignment,

despite protests from a Task Force investigator who wanted to arrest the individual late on a Friday so that he would have to remain in jail over the weekend as a means of pressuring him into cooperating with an ongoing investigation; that he recommended the return of items seized pursuant to a search warrant when they were later found to have no evidentiary value, despite the wishes of other Task Force members who wanted to retain the items indefinitely to put pressure on the owner; that he objected to the use of subpoenas to compel individuals to travel to the Task Force Office in Buffalo for informal interviews; that he advised against initiating an investigation proposed by Marcus involving wiretaps and requiring extensive manpower, where the subject of the investigation was already awaiting imminent trial in Federal Court; that he disagreed with Marcus' instruction that interviews disclosing potentially exculpatory information should not be preserved; and, that he suggested an allegedly stolen truck engine be inspected by an expert to determine its value and condition to test the owner's claim that it was damaged and to ascertain the difference between its value and the amount the owner paid.

Defendants motion to dismiss raises the objection that plaintiff's allegations reveal only areas of disagreement and dissatisfaction which do not constitute protected First Amendment speech. Defendants further argue that they are, in any event, protected by a qualified immunity.

Although, generally, an employer has an unfettered right to terminate an at-will employee, the employee may not be terminated for a constitutionally impermissible reason (see, *Mt. Healthy City School District Board of Ed. v Doyle*, 429 US 274; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305). It is well settled that public employment may not be made subject to conditions which infringe upon an employee's constitutionally protected right of freedom of expression (*Keyishian v Board of Regents*, 385 US 589, 605-606). To determine whether such a

right has been violated, it is necessary to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (*Pickering v Board of Education*, 391 US 563, 568).

Before such balancing is required, however, the court must initially decide whether the speech at issue touches upon a matter of public concern. If it does not, it is not entitled to First Amendment protection (see, *Giacalone v Abrams*, 850 F2d 79, 86). When an employee's expression does not relate to a "political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" (*Connick v Myers*, 461 US 1____, 146).

Whether speech involves a matter of public concern is determined by its content, form and context (Id at 147-148). The inquiry focuses on the extent to which the employee speech "was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties" (*Koch v City of Hutchinson*, 847 F2d 1436, 1445), and whether the employee was speaking as "a concerned public citizen, informing the public that the state institution is not properly discharging its duties . . . or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution" (*Cox v Dardanelle Pub. School Dist.*, 790 F2d 668, 672, cert den 488 US 909).

Initially, the burden is on plaintiff to show that his speech was constitutionally protected, and that it was a substantial or motivating factor in the defendants' decision to terminate him. If plaintiff meets that burden, defendants must then show by a preponderance of the evidence that they would have reached the

same decision even in the absence of the protected speech (*Mt. Healthy City School District Bd. of Educ. v Doyle*, 429 US, 274, 287, *supra*).

On a prior appeal, the Appellate Division held that the disagreement over the presentation to the Grand Jury of the matter involving a former public employee "clearly involved a matter of public concern", noting that the Grand Jury has no power to consider a report where the subject is no longer a public employee (*Mansour v Abrams*, 144 AD2d 905, 906).

The Appellate Division's conclusion is also consistent with the holding in *Giacalone v Abrams* (850 F2d 79, *supra*), which involved statements by an Assistant Attorney General expressing concern that a litigation strategy formulated by his superiors was legally unauthorized and ethically improper. Although acknowledging that it presented a close question, the *Giacalone* court concluded that such statements touched upon matters of "colorably public concern" (Id at 86).

The Appellate Division did not, however, decide whether any of the other matters set forth by the plaintiff were matters of public concern. Most of them appear to involve disagreements over the internal affairs of the Task Force. Disagreements over a criminal possession of stolen property charge; whether the Task Force should have arrested an individual or allowed him to surrender; whether an extensive investigation should be conducted when the subject was facing an imminent trial in Federal Court; and whether an expert should have been retained to examine a truck engine, do not evidence any illegal or unethical conduct by the Task Force, nor does plaintiff allege that they do. Clearly, therefore, they are not matters of public concern. Every criticism by a public employee directed at his superiors does not "plant the seed of a constitutional case . . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee

complaints over internal office affairs" (*Connick v Myers*, 461 US 138, 149, *supra*).

Likewise, plaintiff's opposition to the use of subpoenas requiring that people be examined at the Task Force office in Buffalo is no more than a disagreement over internal office affairs. Subdivision 4 of Executive Law §70-a authorizes the issuance of subpoenas to compel witnesses to attend hearings "at any place within the state". Plaintiff's contention that subpoenas should not be employed for conducting what he terms "informal hearings" is not supported by subdivision 4, which states that "[e]very witness . . . shall be examined privately and the particulars of such examination shall not be made public". His reliance upon case law involving the more limited subpoena power of District Attorneys (e.g., *Drake v City of Rochester*, 96 Misc 2d 86, affd 74 AD2d 996; *People v Arocho*, 85 Misc 2d 116) is misplaced.

However, the disagreement over the return of items seized pursuant to a search warrant presents a close question. Generally, "property seized pursuant to a search warrant technically remains in the custody of the court, and the District Attorney or property clerk possesses the property only as an officer of the court, subject to the court's direction and disposition" (*Matter of Documents Seized Pursuant to Search Warrant*, 124 Misc 2d 897). The plaintiff does not contend that the initial seizure was unlawful, unlike the case on which he relies (*Matter of B.T. Prods. v Barr*, 44 NY2d 226 [Organized Crime Task Force lacked authority to obtain a search warrant without prior authorization from the Governor and local District Attorney]). Nor does he present any authority holding that law enforcement officials possessing property lawfully seized are obligated to return the property before a court directs such relief (see, *Boyle v Kelley*, 42 NY2d 88 [an Article 78 proceeding for mandamus or an action for replevin are appropriate legal remedies to obtain the return of

property]). However, since the alleged motivation for the continued retention of the items had nothing to do with their evidentiary value, but was done solely to pressure the owner to cooperate with an investigation, plaintiff's concern about the propriety of retaining the items would appear to involve a matter of public concern. Such coercive tactics by the government, at the very least, warrant public scrutiny.

The deliberate failure, as a matter of policy, to preserve exculpatory evidence concerning suspects in a Task Force investigation unquestionably involves a matter of public concern. Suppression by the prosecution of evidence favorable to an accused violates due process "irrespective of the good faith or bad faith of the prosecution" (*Brady v Maryland*, 373 US 83, 87), A prosecutor's obligation to disclose exculpatory evidence to a criminal defendant also includes "a correlative 'obligation to preserve evidence until a request for disclosure is made' " (*People v Martinez*, 71 NY2d 937, 940; quoting *People v Kelly*, 62 NY2d 516, 520). The failure of a governmental agency to preserve potentially exculpatory evidence violates a defendant's due process rights, regardless of whether he was suspect at the time the evidence was obtained (*People v McCann*, 115 Misc 2d 1025). Since "the State has no interest in interposing any obstacle to the disclosure of the facts" (*People v Rosario*, 9 NY2d 286, 290, quoting *People v Davis*, 52 Mich 569, 573), the dubious policy of systematically failing to make a record of exculpatory evidence violated a clear legal duty to do so, and plainly involves a matter of public concern.

In this context, it is well to remember the admonitory words of Justice Brandeis. "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy" (*Olmstead v United States*, 277 US 438, 485 [dissent]).

Because three of the subjects about which plaintiff expressed his views, and for which he was allegedly terminated, involve matters of public concern, it becomes necessary to balance plaintiff's interest in commenting upon them against the interest of the State in promoting efficiency. However, before this is done, the threshold factual question of the basis for plaintiff's termination must be resolved (*Mansour v Abrams*, 144 AD2d, 905, 906, *supra*).

The defendants do not concede that plaintiff's employment was terminated for the reasons alleged in the complaint. In their affidavits, Goldstock and Marcus both give a multitude of general reasons for plaintiff's discharge (Goldstock's affidavit, ¶37; Marcus' affidavit, ¶25). They then refer the court to their deposition testimony which, combined, totals nearly 1,200 pages.

Unfortunately, the general statements in Goldstock's and Marcus' affidavits totally fail to indicate whether the three matters of public concern set forth in the complaint served as a basis for plaintiff's termination. In fact, their statements in the affidavits submitted in this motion are identical to those presented on the prior appeal to the Appellate Division (see, *Mansour v Abrams*, 144 AD2d 905, *supra*, [Record on Appeal, pp 15, 23]), where that court declined to apply the balancing test until the threshold factual question of the basis for plaintiff's termination was resolved (*Id.*, at 906).

The obligation which the Attorney General attempts to foist upon the court of reading all 1,200 pages of the deposition transcripts is rejected. It is not incumbent upon this or any court to search the deposition transcripts to ascertain if the defendants may have specifically addressed whether plaintiff was discharged for the reasons he alleges. The statutory standard of establishing a defense "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212, subd [b]) is not met by reli-

ance upon deposition transcripts which, without proper affidavits, impose an intolerable burden on the court (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32, affd 49 NY2d 924).

Apart from the inadequacy of defendants' moving papers, summary judgment is usually inappropriate in cases involving potentially unconstitutional motivations (see, *Tovar v Billmeyer*, 721 F2d 1260, 1264). This is especially true in cases such as this, where the termination followed 27 months of strained relationships and several separate expressions of protected speech (see, *Peacock v Duval*, 694 F2d 644, 646), rather than after a single remark (see, e.g., *Rankin v McPherson*, 483 US 378; *Connick v Myers*, 461 US 138, *supra*; *Pickering v Bd. of Educ.*, 391 US 563 *supra; Giacalone v Abrams*, 850 F2d 79, *supra*). The necessary fact-finding hearing required denial of defendants' as well as plaintiff's motion for summary judgment.

Nevertheless, the parties contend that, although factual issues may preclude summary resolution of plaintiff's section 1983 claim, the court may decide whether defendants are protected by a qualified immunity. The qualified immunity defense shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Harlow v Fitzgerald*, 457 US 800, 818). Application of the defense focuses on the "objective legal reasonableness" of an official's action, assessed by a consideration of whether the law at the time was "clearly established" (*Anderson v Creighton*, 483 US 635, 639). The rule is intended to enable government officials " 'reasonably [to] anticipate when their conduct may give rise to liability for damages' . . . [and to] know that they will not be held personally liable as long as their actions are reasonable in light of current American law" (Id., at 646, quoting *Davis v Scherer*, 468 US 183, 195).

The parties' contention that the issues of qualified immunity need not await a determination of the reasons for plaintiff's discharge is supported by the immunity's objective; it is intended not as a mere defense to liability, but rather as an immunity from suit (*Mitchell v Forsyth,* 472 US 511, 526). Thus, ordinarily, a court should resolve the issue of qualified immunity at the earliest possible stage in the litigation, even before discovery, and grant a motion to dismiss where the allegations of illegal conduct in the complaint are such that a reasonable official would have believed his actions lawful (*Anderson v Creighton*, 483 US 635, 646, n 6, *supra*).

However, on an earlier appeal of this case, the Appellate Division denied defendants' summary judgment motion, predicated on the defense of qualified immunity. After noting defendants' claim that the plaintiff was fired for an "array of reasons", the Appellate Division stated that because the threshold factual question of the basis for plaintiff's termination was unresolved, "we do not reach the issue of whether defendants are entitled to summary judgment based on their defense of qualified immunity . . . ." (*Mansour v Abrams,* 144 AD2d 905, 906, *supra*).

Since then the parties have conducted extensive discovery, but the basis for plaintiff's termination remains in question. Accordingly, the issue of qualified immunity will be held in abeyance until after trial.

For all of the foregoing reasons the defendants' motions and plaintiff's cross-motion for summary judgment are, therefore, denied.

Accordingly, the process will operate as follows: first a trial to determine the reason for plaintiff's discharge and, if it appears his discharge was in no way related to a matter of public concern, a *Pickering* balancing test will not be needed. If it is determined

that plaintiff's discharge was related to a violation of his First Amendment rights, then a *Pickering* balancing test will be required. If, after such test, it appears that plaintiff's First Amendment rights prevail over the necessity of defendants to operate and maintain an efficient organization, it will then become necessary to examine the issue of defendants' qualified immunity. In so doing, it will be necessary to determine by an objective test whether defendants should have known, under the law as it existed in October 1983, that they were violating plaintiff's constitutional rights.

Plaintiff also seeks leave to amend his complaint to add, as an additional remedy, reinstatement with full back pay and benefits, in addition to the monetary damage award originally sought as relief under his section 1983 cause of action.

Leave to amend pleadings should be freely given absent prejudice or surprise resulting directly from the delay (CPLR 3025, subd [b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755). Although, generally, it is inappropriate to review the merits of a proposed amendment, leave to amend will be denied where the proposed amendment "is clearly and patently insufficient on its face" (*Newton v Aqua Flo Co.*, 106 AD2d 919, 920).

A Section 1983 action which seeks monetary award payable out of state funds is deemed a suit against the state, and is barred by the Eleventh Amendment of the Constitution. However, where such action seeks judgment against a state official in his individual capacity, or requests prospective injunctive relief, it is not deemed a suit against the state and, therefore, is not prohibited (*Will v Michigan Dept. of State Police*, __US__, 109 S Ct 2304, 2311; *Kentucky v Graham*, 473 US 159, 167).

That portion of plaintiff's proposed amendment for back pay necessarily seeks a monetary award against the state because the

defendants, as individuals, are not personally responsible for such payment (see, *Dwyer v Regan,* 777 F2d 825, 836, mod on other grds, 793 F2d 457). Accordingly, to the extent the proposed amendment seeks to recover back pay, leave to amend is denied.

Reinstatement, however, "is purely prospective injunctive relief that orders the state official to return the former employee to the state payroll" and, as such, it is not barred by the Eleventh Amendment (*Dwyer v Regan*, 777 F2d 825, 836, *supra*).

The defendants contend that, because suit was brought against them in their individual rather than in their official capacity, the relief sought is time barred. Although suit was admittedly brought against the defendants solely in their individual capacities, the capacity in which a person is designated as a party may be changed by amendment (see, *Brandon v Holt*, 469 US 464, 471 [petitioners in section 1983 action were permitted to amend their pleadings to conform to proof and name the Director of Police in his official capacity]). Furthermore, as a general rule, amendments changing only the capacity in which a party appears relate back to the original pleading insofar as the statute of limitations is concerned (1 Weinstein-Korn-Miller, *N Y Civ Prac*, §203.34).

Granting plaintiff leave to amend does not foreclose defendants from subsequently testing the merits of the amendment, either by a motion to dismiss or for summary judgment. However, now is not "the occasion for disposing of the merits of the new matter" (Siegel, *Practice Commentaries,* McKinney's Cons Laws of NY, Book 7B, C3025:11, p 361).

Defendants oppose amendment on the further ground of prejudice, claiming that an amended answer may be required as well as further discovery, which may be impossible since plaintiff has filed a note of issue and statement of readiness. Defendants also project the looming spectre of a motion to dismiss and possible appeals.

To successfully oppose a motion to amend, defendants must demonstrate that they have been "hindered in the preparation of [their] case or [have] been prevented from taking some measure in support of [their] position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23). The potential of necessary further pleadings or proceedings is not the test. Since the court always has discretion to vacate a note of issue to permit further discovery (22 NYCRR §202.21 [e]), defendants' claim of prejudice is insufficient to defeat plaintiff's motion. Plaintiff's motion to amend is, therefore, granted to the extent it seeks to add the remedy of reinstatement.

Submit order in accordance with this decision.

Dated: May 22, 1991

s/ David O. Boehm

David O. Boehm
Supreme Court Justice

Special Term of the Supreme Court,
Monroe County, New York

Hon. David O. Boehm, Presiding

John Mansour and
Helga-Roswitha Mansour,

Plaintiffs

v.

ORDER
Index #13559-87

Robert Abrams, Ronald Goldstock and
Martin Marcus,

Defendants

Upon the Defendants' motion for summary judgment of August 28, 1990, and the affidavits of: Diane M. Cecero, sworn to August 28, 1990, Robert Abrams, sworn to August 21, 1990, Ronald Goldstock sworn to August 24, 1990, and Martin Marcus, sworn to August 24, 1990, and the exhibits attached thereto — all in support of Defendants' motion and in opposition to Plaintiffs' cross-motions, and

Upon the Plaintiffs' cross-motion for summary judgment of November 1, 1990, and the affidavit of John Mansour, sworn to November 1, 1990, and the exhibits attached thereto in support of the cross-motion and in opposition to Defendants' motion for summary judgment, and upon Plaintiffs' second cross-motion of November 28, 1990, and the affidavit of John Mansour sworn to November 28, 1990 in support thereof, and the affidavit of Diane M. Cecero sworn to November 30, 1990 in opposition, and

Upon the briefs and oral argument of the respective parties on April 11, 1991 [Diane M. Cecero, Esq., Assistant Attorney General appearing for the Defendants, and John Mansour, Esq., *pro se* and as attorney for Helga-Roswitha Mansour], and

Upon the decision of this Court dated May 22, 1991, it is hereby ordered:

1. Defendants' motion to dismiss these paragraphs of the amended complaint, is granted: 29(b), 29(c), 29(e), 29(f) and so much of 29(g) by which Plaintiff alleges expressions which pertained to requests for expert investigation of a Cummins engine;

2. Defendants' motion to dismiss these paragraphs of the amended complaint, is denied: 29(a), 29(d) and so much of 29(g) by which Plaintiff alleges expressions which pertained to the deliberate failure, as a matter of policy, to preserve exculpatory evidence;

3. Defendants' and Plaintiffs' motions for summary judgment on the merits are denied;

4. Defendants' motion for summary judgment on the grounds of qualified immunity is denied, with leave to Defendants to renew that motion after trial;

5. Plaintiffs' motion to further amend the complaint to add, as an additional remedy, reinstatement with back pay and benefits is granted only as to prospective reinstatement, and is denied as to retroactive reinstatement with full back pay and benefits.

Dated: June 13, 1991

s/ David O. Boehm

David O. Boehm
Justice of the Supreme Court

I, John Mansour, Esq., attorney, certify that I have compared this copy with the original order filed, and that it is a true copy.

s/ John Mansour

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

697

PRESENT: DENMAN, P.J., PINE, BALIO, LAWTON, DOERR, JJ.

JOHN MANSOUR AND HELGA-ROSWITHA MANSOUR, APPELLANTS-RESPONDENTS,

V

ROBERT ABRAMS, RONALD GOLDSTOCK AND MARTIN MARCUS, RESPONDENTS-APPELLANTS.
APPEAL NO. 2.

The above named John Mansour and Helga-Roswitha Mansour having appealed to this court from certain parts of the order of the Supreme Court, entered in the Monroe County Clerk's office on June 13, 1991, and Robert Abrams, Ronald Goldstock and Martin Marcus having appealed from certain parts of said order and said appeals having been argued by John Mansour for appellants-respondents, Michael Buskus of counsel for respondents-appellants, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously affirmed without costs for reasons stated in decision at Supreme Court, Boehm, J.

Entered: July 14, 1992 CARL M. DARNALL, Clerk

Supreme Court
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

Seal:
SUPREME COURT
APPELLATE DIVISION
FOURTH DEPARTMENT

IN WITNESS WHEREOF,
I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this JUL 14 1992

s/ Carl M. Darnall
.....
Clerk.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of October A.D. 1992

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1120 SSD 92

John Mansour et al.,

Appellants,

v.

Robert Abrams, et al.,

Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

Seal:
STATE OF NEW YORK
COURT OF APPEALS

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

NOV 28 1994
P.M.B.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

JOHN MANSOUR,

Plaintiff,

-vs-

RONALD GOLDSTOCK AND MARTIN MARCUS,

Defendants.

JUDGMENT AFTER JURY TRIAL
INDEX NO. 87-13559

The issues in the above entitled action having duly come for trial before Justice CHARLES J. SIRAGUSA and a jury at a Trial of this court, held at the Hall of Justice, Rochester, New York, on the 15th, 18th, 19th, 20th, 21st, and 22nd days of July, 1994 and the plaintiff JOHN P. MANSOUR, having appeared by his attorney JOHN P. MANSOUR, ESQ. AND PETER BLAUVELT, ESQ., TRIAL COUNSEL, and the defendants RONALD GOLDSTOCK AND MARTIN MARCUS, having appeared by their attorney, G. OLIVER KOPPELL, Attorney General of the State of New York, DIANE M. CECERO, Assistant Attorney General, of Counsel, and the issues having been duly tried, and the court having directed the jury to return a general verdict accompanied by answers to interrogatories, attached herein, and the jury having rendered a general verdict for the defendants and having returned answers to the interrogatories, attached herein,

Now, on motion of G. OLIVER KOPPELL, Attorney General of the State of New York, DIANE M. CECERO, Assistant Attorney General, of Counsel, attorney for defendants, it is

ADJUDGED that the defendants, RONALD GOLDSTOCK AND MARTIN MARCUS, have judgment against the plaintiff,

JOHN P. MANSOUR dismissing the complaint upon the merits, and it is further Adjudged that the defendants shall waive costs and disbursements.

Dated: November 18, 1994
Rochester, New York

Initials: cs

s/ Charles J. Siragusa

HON. CHARLES J. SIRAGUSA
SUPREME COURT JUSTICE

EXHIBIT
Drf
Court #1 7/22-94

VERDICT SHEET

1. Has the plaintiff proven that his protected free speech on the subject of the OTB/Herman Grand Jury report was a substantial or motivating factor on the defendants' decision to discharge him? IN

   At least five (5) jurors must agree on the answer to this question.

   YES __X__ NO ____

   Jurors who agree should sign on the lines below. If all agree, the foreperson need merely write UNANIMOUS on the first line.

   UNANIMOUS

   _____ _____

   _____ _____

   _____ _____

   Proceed to Question #2.

2. Has the plaintiff proven that his protected speech on the return of the Peterbilt truck chassis was a substantial or motivating factor in the defendants' decision to discharge him?

   At least five (5) jurors must agree on the answer to this question.

   YES __X__ NO ____

   Jurors who agree should sign on the lines below. If all agree, the foreperson need merely write UNANIMOUS on the first line.

UNANIMOUS

_____ _____

_____ _____

_____ _____

Proceed to Question #3.

3. Has the plaintiff proven that his protected speech on the recording of statements made by Mr. WUWK was a substantial or motivating factor in the defendants' decision to discharge him?

   At least five (5) jurors must agree on the answer to this question.

   YES __X__ NO ____

   Jurors who agree should sign on the lines below. If all agree, the foreperson need merely write UNANIMOUS on the first line.

UNANIMOUS

_____ _____

_____ _____

_____ _____

If your answers to Questions 1, 2 and 3 are all NO, stop and report your verdict.

If your answer is YES to any or all of Questions #1, 2 and 3 proceed to Question #4.

4. Has the plaintiff proven that his discharge from employment was a proximate cause of any economic loss he sustained?

   At least five (5) jurors must agree on the answer to this question.

   YES __X__ NO ____

   Jurors who agree should sign on the lines below. If all agree,

the foreperson need merely write UNANIMOUS on the first line.

UNANIMOUS

If your answer to Question #4 is NO, stop and report your verdict.

If your answer to Question #4 is YES, proceed to Question #5.

5. Have the defendants proven that they would have fired the plaintiff even if he had not engaged in constitutionally-protected speech because of job performance?

At least five (5) jurors must agree on the answer to this question.

YES X NO ___

Jurors who agree should sign on the lines below. If all agree, the foreperson need merely write UNANIMOUS on the first line.

s/ Debra A. Nothnagle	s/ ??????????
s/ Robert F. Spiegel Jr.	s/ Phil A. Wood
s/ Eleanor ??????	

If your answer to Question #5 is YES stop and report your verdict.

If your answer to Question #5 is NO, proceed to Question #6.

6. State separately the amount, if any, awarded to the plaintiff for the following items of damages. If you decide not to make an award as to any item, insert the word NONE as to that item.

a) Loss of Earnings $_____

b) Loss of Past Pension Benefits $_____

c) Loss of Social Security Contributions $_____

d) Loss of Sick Leave Benefits Applied Toward Health Care Insurance $_____

e) Loss of Future Pension Benefits $_____

At least five (5) jurors must agree on the answer to this question.

YES ____ NO ____

Jurors who agree should sign on the lines below. If all agree, the foreperson need merely write UNANIMOUS on the first line.

_____ _____

_____ _____

_____ _____

STOP AND REPORT YOUR VERDICT.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of February 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 250 SSD 17

John Mansour et al.,

Appellants,

v.

Robert Abrams, et al.,

Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Seal:
STATE OF NEW YORK
COURT OF APPEALS

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION February 21, 1995

Mo. No. 250 SSD 17

John Mansour et al.,
Appellants,

v.

Robert Abrams, et al.,
Respondents.

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Supreme Court, U.S.
FILED
OCT 11 1995
OFFICE OF THE CLERK

No. 95-408

IN THE

Supreme Court of the United States

October Term, 1995

JOHN MANSOUR and HELGA-ROSWITHA-MANSOUR,

Petitioners,

against

RONALD GOLDSTOCK and MARTIN MARCUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 474-6697

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General

Of Counsel

Dated: October 6, 1995

THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
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Questions Presented

1. Whether this Court should grant certiorari to review a factual claim for which there is little likelihood that petitioner could establish the requisite "causation" under *Mt. Healthy Board of Ed. v Doyle*, 429 US 274 (1977), in view of the fact that a jury has already found that *petitioner would have been fired anyway for other, bona fide reasons* unrelated to petitioner's "speech" claims which survived summary judgment.

2. Whether petitioner has exaggerated the facts and issues by failing to give the full context, omitting the material fact that the disagreement between petitioner and other members of the prosecution team was *because of* petitioner's failure to consult with and discuss the arrest strategy prior to petitioner's unilateral agreement with counsel for the suspect to permit a "voluntary surrender", rather than any dispute over the legality or timing of an arrest instead of a voluntary surrender of the suspect.

3. Whether disagreement over whether to permit a suspect voluntarily to surrender (with an immediate hearing on a bail application) or to arrest the suspect prior to a weekend (when arraignment might be delayed because of court scheduling) even implicates the Constitutional threshold of speech "on a matter of public concern" since it merely involves prosecutorial discretion as to *when* and *how* to file charges which were based upon a grand jury indictment.

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No. 95-408

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN MANSOUR and HELGA-ROSWITHA-MANSOUR,

Petitioners,

-against-

RONALD GOLDSTOCK and MARTIN MARCUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

Counter-Statement of the Case [1]

Petitioner attempts to frame the petition as involving a novel question of law. Although a jury found that he was fired for good cause unrelated to his alleged assertion of protected

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[1] References to "R.__" refer to the Appellate Division Record on Appeal in *Mansour v Abrams*, 185 AD2d 670, 587 NYS2d 880 (4th Dept 1992) (New York State Office of Court Administration microfiche # 4-92-0491).

"speech", petitioner omits substantive discussion of his performance history with the New York State Organized Crime Task Force ("OCTF" or "Task Force"), fails to give the full context of the specific controversy over whether to arrest or permit voluntary surrender of a suspect, and glosses over the decade-long history of this litigation. In short, petitioner has sought to present this case as involving a pure question of constitutional law when, in reality, his case carries with it heavy factual baggage which demonstrates that he was fired for abundant good cause related to his incompetence.

We supply the necessary context which petitioner omits, starting first with his employment history, followed by the specifics of the dispute over arrest-versus-surrender (on which petitioner frames his petition), and, finally, a capsule review of the decade of litigation.

1. Petitioner's poor record of performance

Petitioner was hired in 1970 by the Task Force as an attorney terminable at will (R.140, 391, 407, 894). In October of 1983, after receiving two successive, unfavorable performance evaluations, petitioner was terminated by respondents Ronald Goldstock (the Director of the OCTF) and Martin Marcus (the First Assistant in charge of Field Operations at OCTF) (R.1041-42, 1045-46, 2173). Even without such an adverse evaluation, Task Force employees, who do not enjoy civil service status, could be terminated (R.1044-45).

Respondent Goldstock was appointed as OCTF Director on June 30, 1981 (R.155, 547). Goldstock reorganized the office, implementing a "team" approach to organized crime prosecutions (R.876-77, 1181-84, 1328, 1518). This method involved close cooperation between investigators, accountants and

prosecutors (R.1165-66, 1602-04, 2222-25). Petitioner disliked these management changes, particularly since he had once enjoyed significant autonomy as a *de facto* head of the Rochester regional office of OCTF during a prior administration (R.149, 199, 547).

The implementation of the team investigative and prosecutorial approach under Goldstock's direction depended for its success on close interpersonal working relationships between the attorney and investigative members of the team (R.1602-04, 2222-25). Petitioner, by his words, deeds and attitude, made it known that he did not like the team approach (R.228-229, 233, 562-63). Attorney-advisors like petitioner were no longer "in charge" of particular cases or investigations (R.1602-04, 1606-08, 1770-72, 2054-55, 2222-25, 2272, 2298-99, 2408-2409). Instead, Task Force decision-making was to be collectively decided on such matters as strategy and tactics (R.1602-04, 1606-08, 1770-72, 2408-09).

The theory of team prosecutions and investigations was that individual team members would share their ideas and expertise and arrive at decisions by consensus (R.232-33, 1170, 1602-06, 1859-60, 2054-57). The team method also contemplated that the attorney advisor would *not* make decisions unilaterally; would *not* be "in charge" of the investigations; and would *not* have the last word or authority on matters as to which team members disagreed (R.229, 231, 235, 550-51, 564, 1612-13). Task Force policy under Goldstock was that whenever any matter of substance was not arrived at by consensus of the team, the matter would be brought to the attention of either Goldstock or Marcus or the chief investigator, Fred Rayano (R.229, 231, 235, 550-51, 1765-66, 1859-60).

Petitioner's personal diaries (*see* R.531, 629, 724-25) are replete with sarcastic and derisive comments about "absentee management" (R.681, 683, 691, 821-23, 847). At his deposition, petitioner conceded that his diaries usually reflected his state of mind (R.228-229, 241, 494-95, 517, 669, 688, 797, 813, 830-31, 843-44, 847).

In addition to those continuing differences of opinion with respondents on managerial style, a number of specific errors and mistakes by petitioner gave respondents ample reason to terminate him as a Task Force employee. Petitioner had neglected timely to seal some wiretap recordings, potentially placing an entire investigation into jeopardy if the recordings and evidence resulting therefrom was suppressed (R.304-305, 331, 668-69, 692-93, 2371-73, 2457, 2470-71).[2] Petitioner's only excuse for the untimely sealing was that he had not had time to make copies of the tape (R.2063-64). Marcus advised petitioner that such an excuse was legally dubious in the event of a suppression motion (R.2065-67). Incredibly, petitioner tried to blame the error on respondents on the basis that they had been supervising the investigation (R.270, 615-17, 668-69, 692-93).

Task Force management, as well as other members of petitioner's team, concluded that petitioner was wrong in trying to blame respondents Goldstock and Marcus for petitioner's own error in failing timely to seal a wiretap tape (R.1298, 1913-15, 1985-86, 2063). Petitioner's error in this regard was all the more shocking since another attorney in the office, Karel Keuker, had

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[2] Pursuant to New York Criminal Procedure Law § 700.55, the original tapes from wiretaps must be sealed and given to the court which issued the electronic eavesdrop warrant unless the court directs some other custodial arrangement.

reminded petitioner *in advance* of his specific obligation to seal that tape (R.2283-84, 2372-73, 2421-22). Petitioner's error in failing timely to seal the wiretap recordings also embarrassed the entire Task Force, since the FBI, which had cooperated with the Task Force on this investigation, was very upset when it learned of petitioner's error (R.1985-86).

Petitioner's botch-up on the wiretap tapes was only one of his errors or failures. He embarrassed the entire Task Force in a jointly-conducted search and seizure with State Police, Department of Motor Vehicles officials and other law enforcement officials (R.278-81, 2276-77, 2288-89, 2375-76). A large group of police and Task Force personnel had to wait over an hour to launch their operation in the field because petitioner, who was in personal possession of the search warrant, arrived late for the operation (R.280, 2288-89, 2339, 2464). The other Task Force personnel were quite embarrassed by the inconvenience this caused to State Police and others (R.2288-91, 2375-78, 2464). As Task Force investigator Domres described the incident, "there was a large amount of disgruntlement. People wondering why we were standing around waiting for an hour" (R.2377). Moreover, it was not simply a matter of inconveniencing other law enforcement personnel. The premises to be searched were a large used car and truck lot and adjacent outdoor lots and fields (R.2376-77). Because it was October, the sun was setting earlier and the late arrival of petitioner deprived the searchers of what could have been a more comprehensive search (R.2005, 2376-77, 2422).

Another similar embarrassing episode occurred when petitioner lost a confidential file which had been obtained from State Police (R.2280-82, 2368-69, 2371, 2465-66).

Yet another example of petitioner's incompetence occurred during the questioning of a suspect by a Task Force investigator when petitioner took over the interview (R.1862-63, 2354, 2382-84, 2410-11). Although, ordinarily, it would have been an inconsequential matter of merely deferring to the investigator, in this instance it actually harmed the investigation (R.2293, 2383-84, 2411). The subject of that interview, John Gannon of the Off-Track-Betting Corporation, was a friend of petitioner's (R.2293-94, 2384-85). When petitioner took over the interview and directed the questioning, petitioner actually suggested exculpatory explanations to Gannon (R.2293-94, 2382-83, 2411). As investigator Marando put it, "I was shocked that we were giving him [Gannon] a defense for something that we were there to ask him about" (R.2294).

Petitioner's lack of awareness of, or compliance with, wiretap statutory procedures was demonstrated when he mailed a notice of eavesdropping, instead of personally serving it as the statute requires (R.283-84, 2292, 2378-80). Investigator Domres stated that he lost faith in petitioner after learning that petitioner either did not know, or else simply disregarded, the legal obligation to serve the eavesdropping notices personally (R.2379-80).

At team meetings in which respondents were present, they observed that petitioner did not contribute much of anything to the discussions, largely remaining silent (R.2041-42, 2059, 2098). Petitioner simply remained too isolated from the rest of the team and had little interaction with other team members (R.2041, 2060-61, 2098-2101, 2133). Petitioner was often unavailable during the investigative planning process (R.2361-63, 2473). "It became annoying that things were happening and we'd begin discussing a problem or tactic and there would be no legal guidance" (R.2362). Investigator Marando echoed that opinion (R.2301, 2321). Likewise, investigator Becker stated

that petitioner took only a "minimal role" in developing investigations or prosecutions (R.2473).

Petitioner's incompetence was so notorious in the law enforcement community that other law enforcement agencies were reluctant to cooperate with the Task Force when they learned that petitioner would be working on the case (R.1063, 1940-42, 1985-86, 2008-09, 2317-18). The Monroe County District Attorney was extremely reluctant to cooperate with the Task Force on the stolen truck parts case because petitioner had previously ignored a statutory obligation to obtain the advance consent of the Monroe District Attorney before conducting a wiretap (R.2315). Only after respondent Goldstock personally intervened and asked the Monroe County District Attorney to abandon his objections was the case able to proceed (R.1949-50, 2315-16).

Petitioner's incompetence and reputation for incompetence caused friction between the Task Force and State Police (R.1063, 1940, 1943, 1945, 2317, 2368-69). State Police officials repeatedly complained to respondent Marcus or to Task Force investigators about petitioner's work with State Police (R.1063, 1940, 1947-48, 2317, 2368-69). Task Force investigator Domres testified at his deposition that several State Police investigators had advised the Task Force that State Police could not work with the Task Force as long as petitioner was employed there (R.2368-69). Respondent Marcus gave similar deposition testimony (R.1941-42).

Petitioner's incompetence did not begin during the managerial tenure of respondents Marcus and Goldstock. Petitioner's sanctimonious self-portrayal of himself in the Petition flies in the face of specific findings of fact by courts which awarded a huge damage verdict against the State for major mistakes made

by petitioner. Petitioner's wrongful conduct, under an earlier management team at OCTF, caused the bankruptcy of a private business and enormously costly litigation for the State, resulting in a Court of Claims verdict in excess of $1 million (with interest) -- all because of what the courts found was Mansour's improper and unprofessional conduct. *See, Della Pietra v State of New York*, Claim No. 62334 (Ct Cl July 15, 1985) (unreported decision, pp 6-7) (finding of fact that Mansour applied for a search warrant without obtaining approval of the Governor, as the statutes then required); *id.* at 12 ("the procurance and execution of the search warrant in this instance by Mr. Mansour, in his official capacity with the Task Force was unconscionable, to phrase it in the most charitable light"), *affd, Della Pietra v State of New York*, 125 AD2d 936, 510 NYS2d 334 (4th Dept 1986), *affd*, 71 NY2d 792, 798, 530 NYS2d 510, 513 (1988) (quoting Court of Claims opinion which found Mansour's conduct to be unconscionable)[3]; *Matter of B.T. Productions v Barr*, 54 AD2d 315, 388 NYS2d 483 (4th Dept 1976), *affd*, 44 NY2d 226, 405 NYS2d 9 (1978) (finding that the OCTF, then acting under the direction of John Mansour, had acted unconstitutionally in seizing private property with a jurisdictionally defective search warrant).

While petitioner's errors in the *Della Pietra -- B.T. Productions* matters, having occurred long before Goldstock took over as Task Force Director, were *not* the basis for his termination from the Task Force, the findings of fact by the courts in those cases demonstrate that petitioner never was the knight on the white horse as he implies in his Petition. He was, at best, a

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[3] The Court of Claims decision in *Della Pietra* is contained in the Record on Appeal in *Della Pietra v State of New York*, 125 AD2d 936, 510 NYS2d 334 (4th Dept 1986) (New York State Office of Court Administration microfiche # 4-86-810).

mediocre prosecutor who was eventually terminated by respondents for abundant cause.

2. The specific controversy over arrest versus surrender

Petitioner contends (Petition, pp 2-3) that his reason at the time in question for disagreeing with a Task Force investigator's plan to effect a custodial arrest related to petitioner's concern about the impropriety of arresting the suspect prior to a weekend. The record refutes petitioner's revisionist history of what was said and what happened at that time.

Petitioner's statement of the case is incomplete. By omitting important facts and exaggerating others, petitioner falsely implies that the arrest-versus-surrender disagreement turned on a difference of opinion between petitioner and respondents as to the legality of a custodial arrest in these circumstances. When the full context of the proceedings below is revealed, the alleged constitutional question evaporates.

Petitioner fails to acknowledge that the dispute over the use of a custodial arrest, rather than a voluntary surrender of a suspect, had nothing whatsoever to do with petitioner's belief or assertion *at that time* that the timing of a custodial arrest for a Friday afternoon would violate any rights of the (already indicted) suspect. That assertion in the Petition is a conveniently fabricated issue, which only became an "issue" *after* petitioner had been terminated for cause and petitioner was looking back to find some basis for a lawsuit.

The context of the arrest, which petitioner neglects to mention, is as follows. Edward Jewsbury had just been indicted by a grand jury in connection with a stolen car parts ring (R.2245-46). Jewsbury operated a junk yard in suburban

Rochester, but the stolen car parts were received from New York City (R.2245-46). Because the case involved a ring of car thieves and "fences", the Task Force understandably sought to prosecute more than the ultimate retailer of the stolen parts (Jewsbury). As a result, the Task Force would have considered "cutting a deal" with Jewsbury *if* he would have turned State's evidence and cooperated in the prosecution of others involved in the theft and fencing network.

With that background, Task Force investigator Stephen Marando considered that it would have been a useful tactic to have Jewsbury spend the weekend in jail upon his arrest, so that he would get a "taste" of prison (R.673, 2246-47). Then, the suspect, who had already been indicted by the grand jury (R.673, 2245-46), might cooperate in the prosecution of other, "bigger fish".

However, before the Task Force team -- which included attorney-advisor John Mansour (the petitioner), as well as investigators -- could meet to discuss and decide an arrest strategy, petitioner *unilaterally* agreed with the suspect's lawyer to permit the subject voluntarily to surrender, rather than be arrested (R.558-59, 2247-2248).

While it may be appropriate in some instances to permit suspects voluntarily to surrender, rather than be taken into custody (R.2252), the investigators on petitioner's team complained to their superiors (respondents) that petitioner had voluntarily agreed to that procedure without even consulting team members (R.2249). Respondent Marcus (the First Assistant in charge of Field Operations) reprimanded petitioner ***because petitioner failed to consult with team members on a matter as to which team members should have had input*** (R.1523-24, 1916-17, 2079, 2249-51, 2351, 2478). First

Assistant Marcus chose not to countermand petitioner's decision because petitioner had already made a verbal commitment with the lawyer for the suspect (R.276, 558-59, 1916-17, 2079, 2097).

Petitioner points to no contemporaneous documentation of any disagreement with Task Force management demonstrating any belief, much less any articulated disagreement, based on the rights of the suspect, Jewsbury. Instead, the record evidence shows that petitioner was concerned with "saving face" with an opposing lawyer. The notation in petitioner's office diary labelled the episode a "fiasco" and a "humiliating joke" (R.673, 826), suggestive more of intra-office friction than any constitutional issue. The investigators on the team, in sworn depositions, characterized petitioner's motives for seeking Jewsbury's surrender (rather than a custodial arrest) as petitioner's desire not to "make waves" in the legal community (R.2247-48). Despite petitioner's propensity to write memos to the file or to management on other disputed issues, at no time prior to the filing of the complaint in this lawsuit did petitioner attribute any First Amendment or "speech" reasons to his disagreement with the Team on the surrender-versus-arrest of Jewsbury.

In short, petitioner has substantially exaggerated the substance of the single episode on which he seeks to frame a claim of a constitutional violation.

3. Petitioner's lawsuit against respondents

Although respondents will not burden this Court with a full recapitulation of the ten years of litigation in the courts below, we highlight three facts worthy of emphasis: *first*, petitioner had full and complete discovery, encompassing thousands of pages of documents and repeated depositions of respondents and other Task Force employees; *second*, despite substantial grounds for dismissing the entire complaint via summary judgment -- either on the basis of the failure of any of petitioner's "speech" to rise to the level of a constitutional issue of "public concern" *or* on the basis of qualified immunity -- the courts below bent over backward to give petitioner his day in court before a jury; and, *third*, a jury, on the basis of a jury charge to which petitioner consented, expressly found that respondents had other, good grounds for terminating petitioner *even if* any of petitioner's "speech" also played a role. We briefly outline these three facts to demonstrate that it would be a waste of time and judicial resources to grant this petition.

First, as to exhaustive discovery. Although an earlier, scattergun complaint with eleven purported causes of action had been dismissed on the pleadings upon the ground that it failed to state a cause of action, the intermediate appellate court reinstated the complaint on the basis that, at the pleadings stage, petitioner should be given every possible favorable reading of the complaint. *Mansour v Abrams*, 120 AD2d 933, 502 NYS2d 877 (4th Dept 1986). After limited discovery, respondents moved for summary judgment. The intermediate appellate court affirmed the denial of summary judgment on the basis that discovery should be exhausted prior to the consideration of the summary judgment motion on the merits. *Mansour v Abrams*, 144 AD2d 905, 906, 587 NYS2d 379 (4th Dept 1988).

Thereafter, exhaustive discovery was conducted. Petitioner deposed the Attorney General of the State of New York, the Director of OCTF (respondent Goldstock), the First Assistant of OCTF in charge of field operations (respondent Marcus), as well as attorneys, investigators and other OCTF staff. Petitioner obtained thousands of pages of documents, including personnel records of other employees who were on petitioner's "team" or "group" within OCTF. Before defendants renewed their summary judgment motion, petitioner advised the trial court that petitioner was satisfied that discovery had been thorough and complete.

Second, the courts below never reached or decided the question of respondents' entitlement to qualified immunity, thereby allowing petitioner to present his case to a jury. The trial court granted partial summary judgment to respondents, by dismissing some of the specific allegations premised on the First Amendment. *Mansour v Abrams*, 151 Misc 2d 121, 573 NYS2d 364 (Sup Ct Monroe Co 1991). Petitioner and respondents cross-appealed. On petitioner's appeal, the intermediate appellate court affirmed for the reasons stated by the trial court. *Mansour v Abrams*, 185 AD2d 671, 587 NYS2d 880 (4th Dept 1992). On respondents' appeal, the Appellate Division affirmed, refusing to reach the merits of respondents' qualified immunity defense. The trial judge had expressly ruled that the issue of qualified immunity would be held in abeyance until after trial. *Mansour v Abrams*, 185 AD2d 670, 587 NYS2d 879 (4th Dept 1992).

Third, the jury found in favor of respondents on the basis of the *Mt. Healthy* "dual motive" doctrine, *i.e.*, the jury found that, regardless of any of petitioner's "speech", respondents could and would have fired petitioner anyway for good and valid reasons.

The case was tried for six days before a jury in July of 1994. In response to special interrogatories, the jury answered "YES" to the questions as to (1) whether petitioner's "speech" regarding the OTB/Herman Grand Jury report was a substantial or motivating factor in the defendants' decision to discharge him; (2) whether his "speech" relating to the return of a truck chassis was a substantial or motivating factor in the defendants' decision to discharge him; and (3) whether petitioner's "speech" on the recording of statements made by Mr. Wnuk was a substantial or motivating factor in the defendants' decision to discharge him.

The jury also found, in response to a separate interrogatory, that defendants had proven that they would have fired petitioner anyway *because of his job performance* even if petitioner had not engaged in any constitutionally protected speech.

ARGUMENT

The petition is plainly without merit. A jury found, in response to special verdict questions as to which petitioner did *not* object, that petitioner would have been fired anyway for his inadequate job performance.

There is no occasion for this Court, in this or any other case, to engage in an academic exercise of reviewing hypothetical questions of constitutional law. The factual finding of the jury -- that respondents were justified in firing petitioner because of his inadequate job performance -- is dispositive of the case. This Court in *Mt. Healthy City School Dist. v Doyle*, 429 US 274, 284-287 (1977), held that an employee who would have been fired anyway (because of inadequate job performance) should not be placed in a better position merely because he or she engaged in "protected speech". Employees terminable at

will should not be able to elevate their status to tenured employees by engaging in protected "speech" when they would have been terminated anyway for reasons of job performance. 429 US at 286.

The trial judge had earlier denied respondents' motion for dismissal on the basis of qualified immunity, with leave to renew *after trial*. The Appellate Division did not disturb that ruling, affirming for reasons stated below. *Mansour v Abrams*, 185 AD2d 671, 587 NYS2d 880 (4th Dept 1992). Thus, respondents had to endure ten years of litigation and a trial on the merits and the issue of their entitlement to dismissal on the basis of qualified immunity was never resolved. *See, Mitchell v Forsyth*, 472 US 511, 526 (1985) ("[L]ike an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."); *Siegert v Gilley*, 500 US 226, 231-235 (1991) (unless petitioner establishes, as a threshold matter, that the relevant constitutional right is clearly established in terms of analogous precedents on the books, defendants should not even be burdened with pre-trial discovery).

On the merits, the only "speech" relied upon in the petition fails to rise to the threshold of speech on a "matter of public concern." The sole authority cited by petitioner in support of the claim that it would have been improper to arrest the suspect just before a weekend (when bail might have been unavailable), is a trial court decision which is unreported in the official reports. *Rothbard v Ringler*, n.o.r., 77 NYS2d 351 (1947). At most, that case supports the view that deliberate timing of an arrest warrant as a tool to enforce a support order in a matrimonial case *might* constitute the common law tort of abuse of process. *Rothbard*, 77 NYS2d at 353. There was no claim of, and no court analysis regarding, constitutional issues in *Rothbard*. It is settled in this Court that suspects arrested pursuant to facially valid warrants

have no constitutional claim based on having been jailed pending arraignment or a bail hearing. *Baker v McCollan*, 443 US 137 (1979). As then-Justice, now Chief Justice, Rehnquist stated in *Baker* (443 US at 144, 145):

> Respondent was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment. *** But we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a [constitutional] deprivation. [¶] Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. (Footnote omitted.)

It would be a waste of time and judicial resources to grant the petition. Because the state courts here bent over backward to allow petitioner to present claims to a jury, to this day the qualified immunity defenses asserted by respondents have never been decided! After a decade of litigation, onerous and burdensome discovery, bulky summary judgment records amassing thousands of pages and a one-week jury trial (resolved in favor of respondents), no court or judge ever ruled on the merits of respondents' qualified immunity defenses. In each instance, the courts deferred the issues until, if ever, petitioner prevailed on the merits. Petitioner got far more leeway and latitude in litigating his case than the qualified immunity doctrine ever contemplated. Despite that, petitioner seeks another bite at the apple. Respondents have been burdened enough with this litigation.

CONCLUSION

This court should deny the writ.

Dated: Albany, New York
October 6, 1995

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 474-6697

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General

Of Counsel